

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| GEORGE AND DOLORES BAKER | : | DETERMINATION |
| | : | DTA NO. 817497 |
| for Redetermination of a Deficiency or for Refund of New | : | |
| York City Personal Income Tax under the Administrative | : | |
| Code of the City of New York for the Year 1996. | : | |

Petitioners, George and Dolores Baker, P.O. Box 353235, Palm Coast, Florida 32135-3235, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the Administrative Code of the City of New York for the year 1996.

On September 10, 2000 and September 28, 2000, respectively, petitioners, appearing by Binder & Binder, P.C. (Harry J. Binder, Esq., of counsel) and the Division of Taxation, appearing by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by January 16, 2001, which date began the six-month period for issuance of this determination. After due consideration of the record, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioners owed New York City personal income tax on lottery winnings for the year at issue.

FINDINGS OF FACT

1. During the years 1990 and 1991 and through March 27, 1992, petitioners, George and

Dolores Baker, were residents of the State and City of New York. In 1992, they moved to Florida.

2. In 1990, while a resident of New York City, petitioner Dolores Baker won a prize in the New York State Lottery.

3. Petitioners did not accrue to their 1992 New York State Nonresident and Part-Year Resident Income Tax Return the future installments of petitioner Dolores Baker's lottery winnings and pay New York State and New York City tax thereon.

4. Petitioners did not file a bond or post any other type of security with the Division of Taxation ("Division").

5. As indicated by a Form W-2G issued to petitioner Dolores Baker at her Florida home, the Division of the Lottery paid petitioner \$222,225.00 in lottery winnings in 1996. Federal, New York State, and New York City income taxes were withheld from this amount. New York State tax so withheld was \$15,834.00. New York City tax withheld was \$9,911.00.

6. Petitioners timely filed a 1996 New York State nonresident return (Form IT-203) on which they reported the \$222,225.00 in lottery winnings as New York State income. Petitioners reported a New York State tax liability of \$12,721.00 on their 1996 IT-203.

7. With respect to the 1996 tax year, petitioners did not report and pay New York City personal income tax on their 1996 lottery winnings distribution as if they were still New York City residents in 1996.

8. Petitioners claimed an overpayment of tax on their 1996 IT-203 in the amount of \$13,024.00.

9. On May 27, 1997, the Division issued to petitioners the refund amount claimed on their 1996 IT-203.

10. On May 26, 1998, the Division issued to petitioners a Notice of Deficiency (L-015034503) which asserted City of New York income tax due of \$7,703.00, plus penalty and interest. The deficiency results from the Division's assertion of New York City personal income tax on the lottery winnings paid to petitioner Dolores Baker in 1996.

11. During the years 1990 through and including 1996, petitioners were cash basis taxpayers.

12. Petitioners retained their present representative, Binder and Binder P.C., to prepare their 1996 IT-203.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioners contend that their change in resident status in 1992, from city residents to city nonresidents, triggered the special accrual provisions of New York City Administrative Code § 11-1754(c). Petitioners assert that, pursuant to these provisions, the entire unpaid portion of the lottery winnings were subject to accrual and therefore payable in 1992. Petitioners further assert that, pursuant to Administrative Code § 11-1754(c)(3), because the entire amount of lottery winnings were subject to accrual and therefore subject to city income tax in 1992, petitioners were not required to report winnings paid in 1996 as income subject to city income tax on their 1996 return.

14. Petitioners further assert that, if the deficiency herein is sustained, penalty asserted in the statutory notice should be cancelled because they relied on the advice of their attorney in filing their 1996 return.

15. The Division takes the position that the Notice of Deficiency should be sustained pursuant to Administrative Code § 11-1771. The Division also asserts that petitioners have not established any basis which would justify an abatement of penalty.

CONCLUSIONS OF LAW

A. When a taxpayer changes his or her resident status from a New York City resident to a New York City nonresident, that taxpayer's final resident income tax return is subject to the special accrual provisions of the Administrative Code of the City of New York § 11-1754 which provides, in relevant part, as follows:

(a) General. If an individual changes his or her status during his or her taxable year from city resident to city nonresident . . . such individual shall file one return as a resident for the portion of the year during which he or she is a city resident, and a return under chapter nineteen of this title, for the portion of the year during which he or she is a city nonresident.

* * *

(c) Special accruals.

(1) If an individual changes his or her status from city resident to city nonresident, he or she shall, regardless of his or her method of accounting, accrue for the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status, if not otherwise properly includible (whether or not because of an election to report on an installment basis) or allowable for city income tax purposes for such portion of the taxable year or for a prior taxable year. The amounts of such accrued items shall be determined with the applicable modifications described in sections 11-1712 and 11-1715 as if such accrued items were includible or allowable for federal income tax purposes.

* * *

(4) The accruals under this subdivision shall not be required if the individual files with the tax commission a bond or other security acceptable to the tax commission, conditioned upon the inclusion of amounts accruable under this subdivision in city adjusted gross income for one or more subsequent taxable years as if the individual had not changed his or her resident status.

Administrative Code § 1754(c) thus creates a general statutory scheme whereby city residents who become nonresidents may “opt out” of the special accrual requirement by taking affirmative action and posting a bond or security in accordance with Administrative Code

§ 1754(c)(4).

B. With respect to lottery winners who change status from city resident to city nonresident Administrative Code § 11-1771 creates a different set of rules. Specifically, Administrative Code § 11-1771(b)(2)(D) requires withholding of city income tax on lottery winnings in excess of \$5,000.00 if the winner was a resident of the city at the time of the lottery drawing. Additionally, Administrative Code § 11-1771(b)(3)(B) allows taxpayers who are recipients of lottery winnings to substitute withholding from their winnings in lieu of “a bond or other security” as follows:

Withholding on lottery winnings upon change of residence. If a payee of lottery winnings . . . changes status from resident to nonresident, withholding . . . shall constitute other security acceptable to the commissioner of taxation and finance within the meaning of paragraph four of subdivision (c) of section 11-1754, *unless such payee elects*, in such manner as the commissioner of taxation and finance shall prescribe, *to apply the provisions of paragraph one of such subdivision (c) to the proceeds, in which case withholding under this subdivision shall no longer apply to such proceeds.* (Emphasis added.)

The effect of these provisions is that lottery winners who change their status from city resident to city nonresident are not subject to the special accrual provisions of Administrative Code § 11-1754(c) unless they “opt in” to such special accrual provisions. Here, petitioners did not make an election under Administrative Code § 11-1771(b)(3)(B). City income tax was therefore properly withheld on petitioner Dolores Baker’s lottery winnings for the year at issue. Given petitioners’ failure to report their lottery winnings on their 1996 return as income subject to the city income tax, the Division properly asserted a deficiency of New York City personal income tax for that year. Administrative Code § 11-1771 thus closes the loophole by which petitioners seek to avoid taxation in the instant matter.

C. Petitioners’ argument that the special accrual provisions of Administrative Code

§ 11-1754(c) applied to the instant matter is in error because such argument ignores the plain language of Administrative Code § 11-1771(b)(2)(D) and (3)(B) which, as noted, requires the withholding of lottery winnings under the present circumstances. Contrary to petitioners' assertion, the required withholding of city income tax on the lottery winnings establishes that such payments were properly subject to city income tax in 1996 (*see*, Administrative Code § 11-1771[a][1]; § 11-1773).

D. Petitioners contend that penalty asserted in the statutory notice should be abated because they acted in good faith and relied on the advice of counsel. Petitioners assert that it is “blatantly clear” that there was reasonable cause in the instant matter. Petitioners submitted no evidence in support of this contention. Their arguments with respect to this issue are contained in the reply brief submitted by their representative.

It is a well-settled principle that each taxpayer has a nondelegable duty to prepare and file timely tax returns with payment and the mere assertion, without more, of reliance upon professional advisors or employees does not constitute reasonable cause (*see, Logan Lumber Co. v. Commissioner*, 365 F2d 846; *see also, Sanderling, Inc. v. Commissioner*, 571 F2d 174).

In making a determination as to whether reasonable cause exists when a taxpayer has relied on the advice of a professional, it must be shown that the taxpayer relied in good faith on the advice he received and it must have been “reasonable” for the taxpayer to rely upon the particular advice he was given (*see, LT & B Realty Corp. v. New York State Tax Commn.*, 141 AD2d 185, 535 NYS2d 121). When determining whether the taxpayer has shown that his reliance was reasonable, the burden is on the taxpayer to demonstrate that he acted with ordinary business care and prudence in attempting to ascertain his liability, if any, for taxes (*see, United States v. Boyle*, 469 US 241; *Matter of Koether, supra*). (*Matter of McGaughey*, Tax Appeals Tribunal, March 19, 1998.)

Here, the record contains nothing more than petitioners' general assertion of reliance on the advice of their attorney. Petitioners have thus failed to meet their burden to show that penalty should be abated.

E. The petition of George and Dolores Baker is denied and the Notice of Deficiency dated May 26, 1998 is sustained.

DATED: Troy, New York
April 26, 2001

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE